

AMENDED FINAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND SECTIONS 16423, 16433, and 16450 through
16455 OF TITLE 8, CALIFORNIA CODE OF REGULATIONS

UPDATE OF INITIAL AND SUPPLEMENTAL STATEMENTS OF REASONS

As authorized by Government Code Section 11346.9(d), the Acting Director of the Department of Industrial Relations (“Director”) incorporates the Initial Statement of Reasons and Supplemental Statement of Reasons prepared in this rulemaking.

Revisions Following Initial Public Comment Period

The following sections were revised following the initial public comment period and circulated for further public comment: 16423, 16433 [added to rulemaking for purposes of making conforming changes], 16450, 16451, 16452, 16453 [text repealed and not replaced], 16454, and 16455. Each of the revisions was described, together with the reason, purpose, and necessity for the proposed revision, in a Supplemental Statement of Reasons that was circulated with the Notice of Modifications and the text of the revisions.

As noted at page 12 of the Supplemental Statement of Reasons, the language of subpart (b) of section 16452 was almost completely redrafted to match the language used in Labor Code Section 1771.3(a)(3), as amended by AB 436. The new language no longer refers to the billing and payment of fees, but instead refers to a rate or rates to be charged, using the language of the statute. The purpose and intent of the new regulatory language, as was also noted, was to inform the public that the fee requirements for bond-funded projects would be determined in accordance with the statutory specifications and limitations but not set forth in these regulations. Although 16452(b) was changed in this specific manner, neither the Director nor the Attorney General’s bond counsel believed it was necessary to remove other references to the term “fee” in these regulations. The term fee, as used everywhere else, can and should be understood in its common and generic sense as the amount charged by the Department for its services, based upon the approved rate or rates.

Further Revisions After 15-day Public Comment Period

The titles of sections in the Table of Contents were revised to conform to how those titles were revised at the head of the individual sections. In section 16433(c), “subdivision (a)” was changed to “subpart (a) above,” to make the phraseology consistent with all other regulations in these subchapters. In section 16450(a), the phrase “or the effective date of these regulations, whichever is later” was deleted. This phrase had been inserted as placeholder text to account for the possibility that the regulations might not be submitted or approved in time for the stated effective date of January 1, 2012. However the text is unnecessary for the final regulation and potentially confusing if left in. These changes are nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

LOCAL MANDATES DETERMINATION

The Director adopts her initial determination that these regulations do not impose mandates on local agencies or school districts, as set forth in the Notice of Proposed Rulemaking published on July 1, 2011.

SUMMARY AND RESPONSES TO COMMENTS

In accordance with Government Code Section 11346.45, it is the Department's regular practice to discuss regulatory concepts and proposals with interested persons prior to commencing a formal rulemaking. However, it was not feasible to have those kinds of discussions in this instance. As noted in the Notice of Proposed Rulemaking, the Initial Statement of Reasons, and the Supplemental Statement of Reasons, this rulemaking was required to bring the SBX2-9 regulations into conformity with contemplated statutory changes that were being made to address legal concerns relating to the requirements of bond law. Moreover, while logically the legislation should have preceded the regulatory revisions, it was necessary to commence this rulemaking in July – before the legislative revisions had been agreed upon and introduced – in order to have a reasonable chance of completing the rulemaking and filing a certificate of compliance with Government Code Sections 11346.2 – 11347.3 prior to the expiration of the emergency order of repeal of predecessor regulations on November 1, 2011. The initial rulemaking documents explained these circumstances and made revisions needed to address the legal concerns and anticipated legislative changes. Then, after the actual legislation (AB 436 [Solorio]) had been introduced and adopted by the Legislature, the Director revised the proposals to conform more closely to the legislation. Those revisions were issued on September 29, 2011, and the legislation was signed and chaptered (Stats. 2011, ch. 378) the following day.

During the initial public comment period, the Director received comments in response to the proposals either in writing, orally at the public hearing, or both, from the following individuals and entities: Small School Districts Association; Bret Harte Union High School District; Cerritos College; The Solís Group; Mt. San Antonio College; Contractor Compliance & Monitoring, Inc. (CCMI); Mark Douglas of LCPtracker, Inc. and others;¹ CS & Associates and Charla Curtis; Redondo Beach Unified School District; State Water Resources Control Board; DCM Group; James Reed of Labor Compliance Providers and the Center for Contract Compliance; Pat Padilla of Padilla & Associates, Inc.; and James Sowerbrower of the California State University. Written comments were also received after the close of the public comment period from the Inglewood Unified School District and the California Department of Public Health (CDPH).

During the additional public comment period provided after the issuance of the further revisions, written comments were received from the following individuals and entities: Fresno Unified School District; Associated Builders and Contractors of California (ABC); State Water Resources Control Board [substitute submitted and accepted on October 20, 2011]; California Department of Public Health (CDPH); and Contractor Compliance & Monitoring, Inc. (CCMI).

¹ Mr. Douglas's written comments were also signed by Sr. Labor Relations Specialist Ivory J. Anderson, Jr., and also by Deborah E.G. Wilder of Contractor Compliance & Monitoring, Inc., Jake Sloan of Davillier Sloan, Inc., and Mark Griffith of Advocates for Labor Compliance.

The comments and responses are grouped by topic and section as indicated in the page number index below. Within each subject, comments and responses are also divided between the initial proposals and the further revisions. Comments designated as “oral” means that they were provided during the public hearing on August 15, 2011, and are distinct from the written comments that the same individual or entity may have presented.²

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Comment on Mandates on Local Agencies or School Districts:

Small School Districts Association (SSDA): Object to finding on page 7 of Notice of Proposed Rulemaking that new fee is not a state mandate on local agencies or school districts. Court settlement in the *Williams* litigation clarified legal obligation of school districts to ensure adequacy of their facilities, and the legal logic underlying the *Serrano* decision means that the state cannot require school districts to rely on local property taxes to fund school facilities without state support. Thus, participating in the state program is not voluntary, and findings should be rewritten to recognize that the fee requirements would be a new duty and a higher level of service within the meaning of Article 13B Section 6 of the California Constitution.

Director’s Response: *These comments do not affect the local mandates determination, and*

² In both written and oral comments, the terms “labor compliance program,” “Department of Industrial Relations,” “Division of Labor Standards Enforcement,” “Compliance Monitoring Unit,” and “certified payroll record [or report]” were often reduced to their acronyms “LCP,” “DIR,” “DLSE,” “CMU,” and “CPR.” If one of these acronyms was used in a comment, it may also appear that way in the comment summary and response below.

that determination has not been changed. The requirement to use this Department for fee-based monitoring and enforcement is imposed by statute and not mandated by these regulations or subject to repeal by regulation. The maximum fee formulas are also set by statute, and are substantially less on a cost per project basis than what the State Allocation Board has provided for labor compliance on state bond-funded school construction projects over the past several years. This was true of the original maximum allowable fees under SBX2-9, and the potential fees have now been further reduced by AB 436 and these regulatory amendments.

Comments on Costs or Savings to State Agencies and Nondiscretionary Costs or Savings Imposed on Local Agencies:

Mark Douglas [August 9, 2011 e-mail]: There appears to be no financial review of this major piece of legislation and the impact SBX2-9 is going to have on the State, Jobs, Employees, and small business. SBX2-9 also dramatically effects the level of monitoring the State will provide at a much reduced rate than the current levels of monitoring the State currently enjoys.

CCMI: CCMI disagrees with the conclusion that there is not any adverse impact on agencies, small business or the public. There is an impact on agencies because in many instances they will be forced to pay the DIR/CMU fee even though they already have competent consultants assisting them. The public will be impacted because the DIR/CMU system is already set up to operate at a deficit, which will result in additional debt, impacting the public at large.

Director's Response: *These comments do not provide a basis for modifying this Costs Impacts determination. As stated by Mr. Douglas, these are projected impacts of the statute rather than these regulations. See also the response to the Comments of Mark Douglas and others on Proposals in General below.*

Comments on Economic Impacts on Business, on Elimination or Expansion of Jobs or Businesses, and on Small Business:

Mark Douglas [August 9, 2011 e-mail]: There appears to be no financial review of this major piece of legislation and the impact SBX2-9 is going to have on the State, Jobs, Employees, and small business. SBX2-9 also dramatically effects the level of monitoring the State will provide at a much reduced rate than the current levels of monitoring the State currently enjoys.

CCMI: CCMI disagrees with the conclusion that there is not any adverse impact on agencies, small business or the public. Small businesses will be impacted on two bases: 1) labor compliance consultants will be put out of business, and 2) contractors will incur additional costs in complying with the CMU system when the state funds that trigger CMU requirements are awarded after the project is already underway.

Mark Douglas and others: Same observations as CCMI.

Director's Response: These comments do not provide a basis for changing these impacts determinations. As stated by Mr. Douglas, these are projected impacts of the statute rather than these regulations. In addition, there is no evidence that SBX2-9 or these regulatory revisions will put labor compliance consultants out of business, and at least three factors argue against this conclusion. First, while school districts could hire outside consultants using additional funds provided by the State Allocation Board to meet the labor compliance program requirement in Labor Code Section 1771.7, this was only for two finite bond programs (Propositions 47 and 55) without any future guarantee or expectation of state funding for labor compliance consultants from any other source. Second, awarding bodies can and some presumably will continue to use outside consultants to meet the labor compliance program requirement for Proposition 84-funded projects. Third, according to the commenters' own observation, outside consultants are still needed for federally-funded projects. With regard to the second impact projected by CCMI, the Director does not expect or intend to impose any requirements that will cause contractors to incur additional costs in instances where CMU requirements are triggered after a project is already underway. A further response on this specific area of concern is provided in response to CCMI's related comments on section 16451 below.

Comment on Known Cost Impacts on Representative Private Person or Business:

California Department of Public Health (CDPH): Unless private entities and individuals, including privately owned public utilities (regulated by the California Public Utilities Commission) are exempt from the labor compliance provisions, it appears there will be a cost to private representative persons or businesses which utilize state bond funds for a public works project. CDPH's bond programs all provide funding to both private persons and businesses which are public water systems.

Director's Response: The Director accepts this as a clarification that does not change the impact statement. For purposes of SBX2-9 and these regulations, the privately owned public utilities that receive bond funding from CDPH for public water systems are, in effect, public agencies subject to the same impacts projected for other local agencies. They do not fall within the scope of this particular impact statement, which is intended to evaluate impacts on private enterprises operating in a competitive environment.

Comment on Effect on Small Business:

Mark Douglas [oral]: Then let's talk about the third party groups that are in place today. There was some wording in the language that said there is no harm to small business. Well, that's simply not true. You've got a whole business community of consultants, third parties, that have approximately, I think it was estimated, about 300 to 400 employees, and then you have another several hundred -- maybe as much as 3 or 400 -- independent consultants that are being hired throughout the state to help support LCP programs and labor compliance. And all of those are being told you cannot hire -- there is a lot of confusion, I admit. . . . There's confusion on whether a local agency can hire a third party, yet they may still have to pay the fee, or do they have to pay the fee? In fact, I would like some clarity on that today, if we could. What is the direction of the DIR on that?

Pat Padilla [oral]: As it stands now, SBX2-9 not only will adversely affect small businesses throughout the State of California that have gainful expertise, as third party administrators, monitoring public works projects -- the vast majority of the third party administrators are, in fact, small businesses -- it will further represent a significant number of jobs lost that are skilled and professional tracked positions in the State of California. I don't know how this would meet the author's objectives in maintaining jobs and job creation. I think that small businesses have created an entry to small businesses through this venue of being independently certified to offer this service.

Director's Response: These comments do not provide a basis for changing this impacts determination. As stated by Ms. Padilla, these are projected impacts of the statute rather than these regulations. See also the responses to comments on sections 16450 and 16455 below.

California Department of Public Health (CDPH): CDPH provides bond funding to both private persons and businesses which are public water systems. It is our understanding such private business is an "awarding body", within the meaning of Labor Code 1722, when it contracts for construction of a project which will be funded in whole or in part with state bond funds. Thus it appears the labor compliance fee requirements would apply to such private entities receiving bond proceeds for a public works project.

Director's Response: The Director accepts this as a clarification that does not change the impact statement. CDPH's understanding of the "awarding body" status of these entities is correct; and for purposes of SBX2-9 and these regulations, the privately owned public utilities that receive bond funding from CDPH for public water systems are, in effect, public agencies subject to the same impacts projected for other local agencies.

Comments on Proposals in General and Uncategorized Comments:

CCMI: We found the proposed regulations to be both confusing and contradictory. Regulations were initially implemented in August 2010 and then suspended in October. The newly proposed regulations only discuss Sections 16423, 16450, 16451, 16452, 16453, 16454, and 16455. Is the public to assume that other sections of the Regulations implementing the CMU will be part of the new implementation or not? We believe the rulemaking process should have included ALL regulations which DIR intends to implement with this new program in January 2012.

Director's Response: The history surrounding this rulemaking is confusing, but the Department's approach and the anticipated outcome in light of that history were explained in both the Notice of Proposed Rulemaking (at pages 3-4) and the Initial Statement of Reasons (at pages 2-3). In 2009-2010, the Department proposed and adopted (1) amendments to existing labor compliance program regulations, (2) new regulations governing fee-based compliance monitoring by the Department under SBX2-9, and (3) a couple of other non-substantive regulatory code revisions. Most of the revisions to the labor compliance program regulations were unrelated to SBX2-9, other than some notice requirements that had been added to section 16423. All of these items were approved and became effective on August 1, 2010.

Another state agency subsequently raised questions about the constitutionality of SBX2-9 fee requirements in relation to General Obligation Bond law, and bond counsel within the Attorney General's Office concluded that those questions prevented her from writing unqualified opinion letters to support the impending sale of state public works bonds. Without unqualified opinion letters, the State could not sell its bonds, and because the operation of SBX2-9 was contingent upon having regulations in effect,³ the former Director took emergency action to suspend operation of the Department's SBX2-9 regulations in order to remove the impediment on bond sales. The Department did not and does not believe that it was necessary to suspend the regulations in their entirety in order to make them ineffective, but the Attorney General's bond counsel was unwilling at that time to write unqualified bond opinions unless the Department suspended all of the new regulations as well as the 2010 amendments to section 16423 that had referred to SBX2-9.⁴

Under Government Code Section 11346.1, the emergency order of repeal of the new SBX2-9 regulations could only remain in effect for 180 days, plus up to two additional extensions of 90 days each. At the end of this time period, the emergency repeal will expire, and the preexisting regulations that were adopted last year will go back into effect unless they are replaced by new regulatory language adopted through the regular rulemaking process.⁵ This current rulemaking is a regular rulemaking being conducted to revise some of the old (pre-emergency repeal) regulatory language; but this rulemaking is only focused on the regulations that need to be revised.

Specifically, this rulemaking has focused only on those regulations that needed to be revised to address the Attorney General bond counsel's concerns and to bring the regulations into conformity with the revised requirements of AB 436. As was stated at page 4 of the Notice of Proposed Rulemaking, no revisions were proposed for the regulations in Article 2 (sections 16460 – 16464) that will govern operation of the new Compliance Monitoring Unit, because these standards were not part of the controversy that led to AB 436, and the language of those regulations will automatically be restored upon expiration of the emergency repeal.

³ The requirement to adopt reasonable regulations setting forth how the Department will conduct compliance monitoring and enforcement was specified in Labor Code Section 1771.55(b)(2), and all of the other statutes that required use of the new monitoring and enforcement system were made contingent upon these regulations becoming effective. *See, for example*, Labor Code Section 1771.3(b) and Public Contract Code Section 20133(b)(3)(B). Under AB 436, the requirement to adopt regulations has been moved from Labor Code Section 1771.55 into Sections 1771.3(a)(3) and 1771.5(g), but substantively it remains the same.

⁴ Since the legal questions raised about SBX2-9 pertained to the requirements of the General Obligation Bond law, the CMU program could have been permitted to go forward for projects that did not receive state bond funding. However, the Attorney General's bond counsel was not comfortable with that approach in the fall of 2010 when the legal issues had not been fully aired and a brief window of opportunity to sell bonds had opened. Another practical impediment to implementing the CMU at that time was a state hiring freeze that would have prevented the Department from staffing the program.

⁵ The maximum 360 day time limit, which in this case expires on November 1, 2011, is actually the time within which the agency must have completed the process of adopting new or amended regulations and then file a "certificate of compliance with Government Code Sections 11346.2 – 11347.3" along with the new regulatory package with the Office of Administrative Law. The regulations that are being amended will then remain under suspense pending review and approval by the Office of Administrative Law.

The regulatory amendments adopted through this rulemaking revise the effective date of the new program and requirements related to the program's applicability and fees. They do not revise or affect either the operational standards that will govern the new program or various other regulations pertaining to the monitoring and enforcement of prevailing wage requirements on public works projects. When the new program becomes operational on January 1, 2012, as is now projected, this whole body of law and operational standards, as well as these regulatory amendments will apply to the new Compliance Monitoring Unit and any projects subject to monitoring and enforcement by that Unit.

Mark Douglas and others: SBX2-9 will create the following changes in California Labor Compliance: 1. The State will only be monitoring at a 40% of the current level of monitoring the State now enjoys. 2. The financial cost of operating the CMU will create at least \$40 - 50 Million dollar operational deficit. 3. Local Agencies with large projects will not pay the fee of ¼ percent of construction. 4. Local agencies will have to pay more for Labor Compliance than they currently pay. 5. Thousands of construction jobs are at risk in the immediate future. 6. A small business industry will cease to exist and jobs will be lost permanently in California.⁶ The State is unlikely to fund an up to a \$50 Million deficit program, which will result instead in the DIR implementing a program with less than full compliance and/or a program with additional serious backlog. There will be a loss of jobs in the State; at least 60% of the current monitoring will cease to exist; and local agencies will have to pay twice for labor compliance. We recommend the following changes to the regulations: (1) Some option must be developed for public agencies that receive both state and federal funding so that they do not have to hire labor compliance assistance to meet federal prevailing wage requirements and still have to pay the CMU for monitoring California's requirements. (2) Allow any agency with an approved LCP to be exempt from CMU fees, whether or not they use the services of outside consultants. (3) Full LCP compliance should be required by the CMU as is mandated for LCPs. We recommend a review of LCP requirements and perhaps implementing a two-tiered system for lower and higher cost projects. However, the CMU should be held to the same level of compliance and investigation that Public Agencies meet.

Director's Response: As acknowledged in the heading, these comments are directed at the underlying legislation rather than the pending regulatory proposals. The observations are also largely speculative. The issue of whether the Department should be held to the same monitoring standards as labor compliance programs was raised and addressed in the 2009-2010 rulemaking, where it was noted that SBX2-9 represented a legislative choice to find a cheaper more effective alternative for prevailing wage monitoring and enforcement than the mandated use of labor compliance programs. The Department obviously cannot create or sustain a multi-million dollar operational deficit. It must stay within its authorized budget, and it must accept the challenge facing every state agency to do a better job with fewer resources rather than expecting to obtain all the resources it could put to use in an ideal funding environment. SBX2-9 fees will provide additional dedicated funding for compliance monitoring and enforcement but will not prevent the Department from continu-

⁶ A separate supporting analysis was provided for each listed item. The comments also included a breakdown of 26 tasks performed by labor compliance programs and a statistical estimate of costs for the CMU. The same breakdown of tasks and another cost estimate were included in CCMI's comments on section 16452.

ing to devote some of its other resources to this task. If larger agencies use their own labor compliance programs rather than the CMU, the principal effect will be to reduce the CMU's workload rather than deprive it of funds needed to sustain operations, since the revised legislation and regulations will only permit the Department to recover its costs for actual work on a project. It also seems illogical to assume that awarding bodies will want to take on the responsibilities and higher costs of operating an approved labor compliance program in order to avoid paying the much smaller CMU fees.

While duplicative costs for state and federal compliance are a legitimate concern, the commenters provide no data or estimate of how many awarding bodies or projects are subject to these requirements, or the extent to which they are using outside consultants for these services and what they pay for these services. As noted, awarding bodies will only pay for the actual costs of the CMU on their projects, and the one statutorily required CMU task of reviewing all certified payroll reports will be performed electronically at very limited cost to the awarding body. The Director is not aware of any evidence that construction jobs being held up or eliminated as a result of changes in how labor compliance programs are approved (which is a projected effect of a prior policy decision rather than of these regulations). The sixth projected change is also stated as a point of disagreement with the Director's adverse impact findings and is separately addressed above in response to identical comments on adverse impacts by CCMI.

With regard to the recommended changes, the suggestion about developing an option for agencies that are subject to both federal and state monitoring requirements merits further consideration and study but is beyond the scope of this rulemaking. The suggestion to allow any agency with an approved LCP to be exempt from CMU fees, whether or not it uses outside consultants, cannot be accepted because it would contravene SBX2-9's express prohibition on waiving fees for awarding bodies that contract out labor compliance program responsibilities. See the response to CCMI's comment on section 16450 below, which quotes the controlling statutory language. The suggestions that full LCP compliance be required for the CMU and that the Department also look into adopting a two-tiered monitoring system are also rejected for the following reasons. The first part of this proposal was already considered and rejected in the 2009-2010 rulemaking, and the commenters have offered no new reasons for changing that decision. The commenters concede that the CMU fees will be insufficient for existing tasks, let alone any additional responsibilities. Third, no legal or factual analysis has been provided in support of the suggestion to look into a two-tiered monitoring system, and changing performance standards either for labor compliance programs or the Compliance Monitoring Unit is outside the scope of this rulemaking.

DCM Group: 1. Legislature should direct the DIR to continue to approve Third Party Labor Compliance with clear and concise requirements. Third Party LCP's are placed at a higher and stringent level of Enforcement vs CMU. 2. Any Agency LCP should be allowed to use an approved third party LCP or private firm to assist them in any aspect(s) of the LCP as long as the Agency meets the requirements, whether they use a certified LCP on their own forces. 3. Require that CMU monitor not just prevailing wages but conduct site visits and monitor apprenticeship standards just as an LCP would. In short, the CMU division should be mandated to meet the same standards as the DIR imposes on Agencies and Third Party LCPs. 4. Legislature should direct the DIR to hire CMU staff that have

experience and knowledge of prevailing wage monitoring to ensure proper enforcement and that technical assistance is not limited or unavailable. 5. CMU should NOT be involved in Federal Davis Bacon projects. Agencies should not have to pay extra for private monitoring services on federally funded projects and pay the CMU division; this would be a burden on most agencies. 6. Legislature should direct DIR to establish criteria of which projects will be monitored by the CMU division. For short low budget projects the CMU division should not have authority and the Agency should be responsible since they are completed quickly.

Director's Response: The first, fourth, and sixth suggestions are directed to the Legislature and beyond the scope of this rulemaking and the Director's authority. With regard to the second item, neither the statute or regulations prohibit use of third parties or outside consultants to assist with labor compliance enforcement. However, SBX2-9, as amended by AB 436, clearly states that an awarding body may not contract out labor compliance program responsibilities to a third party in lieu of paying for compliance monitoring and enforcement by the Department on subject projects. The Director cannot modify or overrule this prohibition by regulation. The third recommendation that the CMU follow the same standards as labor compliance programs was thoroughly discussed and rejected in the 2009-2010 due to financial considerations and significant differences between the State Labor Commissioner and labor compliance programs. As CCMI and other proponents of parallel treatment have recognized in this rulemaking, the CMU's dedicated funding is insufficient for the range of activities that the CMU is committed to undertake, let alone for additional responsibilities. Regarding the fifth recommendation, the Department's responsibilities are defined by state law, which does not make an exception for projects that may also be subject to federal Davis-Bacon requirements. Accordingly, this also is a suggestion that can only be addressed by the Legislature.

James Reed [oral]: I just wanted to reflect on the Director's recent letter regarding allowing public agencies to adopt and/or apply for and receive their own Labor Compliance Program if they don't already have an approved program. And as I read it, also it allows them to adopt an existing program in an expedited fashion. What that means, I'm not sure. But I know that there is a lot of agencies who are probably in the mode to adopt a program or have their own program approved to go forward. So I hope that that is part of the regulatory change and that the expedited process is, indeed, expedited.

My second comment is that I've been struggling to find out who came up with the numbers for DIR to charge for this monumental task. As you know, there's probably still at least 100 or more third party and private -- I mean, agency LCPs out there doing compliance work and a great number of staff amongst all of those groups. And we've looked at some numbers that have been presented to a group of Labor Compliance Programs that show the cost probably far to exceed the quarter percent that was established. Every program or contract that has compliance is different. To throw a standard number -- a quarter percent -- at it is not the best way to go. So I would hope that they would allow the DIR or the CMU the latitude to adjust their rates upwards as needed to cover this work, because without that I think we're going to lose a lot in the compliance monitoring of public works projects where the budgets won't allow it or staffing won't allow it.

Director's Response: Both issues raised by the commenter, while relevant to the some of the practical challenges facing the Department, are outside the scope of this rulemaking. The recent implementation of a prior policy decision to no longer separately approve private third party labor compliance programs is not related to any issue being addressed in this rulemaking. With regard to CMU rates, the maximum fees have been set by statute, and specific rate structures must be determined outside this the rulemaking in consultation with and with the ultimate approval of the Department of Finance.

Pat Padilla [oral]: In 2008, among the director's comments, worker interviews or field interviews were identified as essential to the monitoring effort to ensure contractor compliance. However, the CMU proposed practices in this current legislation, as it now stands, will not include interviews, which is in direct contradiction to their own compliance monitoring philosophy and emphasis of the importance of monitoring compliance. So, in summary, I'm not in agreement with the way the language is written.

Director's Response: Section 16461(e) of the SBX2-9 regulations, as adopted in 2010, provided that CMU representatives may make site visits, without requiring them to do so. As most commenters recognize, the Department faces severe funding constraints in terms of fulfilling its monitoring and enforcement responsibilities. Nevertheless, the Director regards site visits as an important tool that this Department intends to use in as efficient and effective a way as our resources and other responsibilities will allow.

Charla Curtis [oral]: I ask that DIR weigh and heavily consider the impact the amended or proposed regulations will have on workers in California, and, also, that the implementation of regs serves the highest good of the most workers or the most people in the State of California. . . . There's been so much confusion among local agencies. I ask that you establish clear and objective criteria for awarding agencies and local agencies to obtain LCP approval. The current standards have been subjective and inconsistent, and there are denials that are being issued, and there's really very little direction or basis for how they get approval. [T]here should be a review period for agencies that have received denials for their LCPs to resubmit and that they be granted some sort of amnesty to get LCP approval. If we're moving forward, then it's critical that we allow awarding agencies that have participated in this process since Day One to receive approval and to maintain a program. And that's what will be in the best interests of workers, to have programs and local agencies participating at ground level.

Director's Response: The commenter's initial general observations do not require a response. The other more specific comments about criteria for approving labor compliance programs are outside the scope of this rulemaking, which focuses on needed revisions to notice and fee requirements in the SBX2-9 regulations.

James Sowerbrower [oral]: We're here to review regulations for a new bill, but I haven't seen the new bill, and I don't know what it's going to say. And researching it even to find the author was very difficult. So I would just like to ask if we can have even a draft copy of the new bill so we can take a look at it and then compare the new regulations to the new bill that is proposed.

Director's Response: This was a request for information that does not require a response. The legislation in question was AB 436 (Solorio), which at the time of the public hearing had not yet been amended to include the SBX2-9 revisions that were subsequently enacted.

California Department of Public Health (CDPH): 1. Due to uncertainties in implementation of the proposed regulations, CDPH encourages the Department of Industrial Relations to extend the emergency regulations. 2. [Made in reference to a definition in 8 Calif. Code Reg. §16000, which is not part of this rulemaking] CDPH provides funding to both governmental entities (such as Cities, Counties, Community Service Districts, and other state or local governmental entities) and privately owned public water systems (such as public water systems owned by nonprofit mutual water companies and for-profit public utilities regulated by the Public Utilities Commission.) Within the context of proposed regulations, who is the "Awarding Body" if the bond funding recipient is a privately owned public water system? (CDPH is not the Awarding Body, merely the funding agency.)

Director's Response: 1. The emergency regulations are already on their final extension under Government Code Section 11346.1(h) and are due to expire on November 1, 2011.

2. See CDPH's comments and responses on impacts on private persons and small businesses above. CDPH previously expressed its understanding that a privately owned public water system "is an "awarding body", within the meaning of Labor Code 1722, when it contracts for construction of a project which will be funded in whole or in part with state bond funds." This understanding is correct, and the regulatory definition should not be read as excluding privately owned public water systems that award public works contracts.

Comments on Proposals in General and Uncategorized Comments following September revisions:

ABC: Because of the enactment of AB 436, which supersedes SB x2 9, we ask for a new 45-day comment period because the changes to statute and the proposed regulations are substantial. [The commenter also offers a number of comments and suggestions regarding AB 436's exception for project covered by a collective bargaining agreement which are summarized and addressed under section 16450 below.]

Director's Response: Because of the unique timing concerns of this rulemaking, which are discussed in the introductory statement and in the response to CCMI's comments on the Proposals in General above, the Director cannot reopen this rulemaking for another 45 day comment period. The Director is constrained by the 360 day limit for adopting revised regulations to replace the regulations that were repealed on an emergency and temporary basis last year. Failing to meet this deadline will bring back to life regulations that need to be revised in light of AB 436 and create another legal cloud over the requirements of SBX2-9 that would require qualified bond opinions and ultimately prevent the state from selling its bonds. The Director further notes that the regulatory language she is adopting with respect to project labor agreements does not alter or expand upon the statutory language adopted through AB 436 and thus is not the kind of new or substantial regulatory change that requires a new rulemaking.

State Water Resources Control Board: The regulations do not address potential conflicts with Government Code Section 16727. Although legislative intent language in AB 436 addresses this issue, communications with the Attorney General's Office have led us to believe that this authority is not yet clear. Absent clear statutory and regulatory language, or a written opinion from the Attorney General's office that the labor compliance fees are reimbursable from bond monies under Government Code Section 16727, we will be unable to reimburse our awardees for the costs of this fee.

Director's Response: A fundamental responsibility of every state agency is to administer and enforce all laws and programs that have been entrusted to its care, whether or not its leaders agree with the purpose or objectives of those laws. Those entrusted with administering and enforcing the law also must endeavor to harmonize legal requirements that might appear to conflict with each other. Conversely, an agency is prohibited under the State Constitution (Article III, section 3.5) from making its own determination about the constitutionality of a statute or refusing to enforce a statute that it believes to be unconstitutional. Over the past year a legislatively mandated program has been placed on hiatus, and hundreds of hours of senior level staff time costing hundreds of thousands in taxpayer dollars have been devoted to addressing the issue raised by the Water Board. These efforts led to the drafting of revised legislation that the Attorney General's Bond Counsel helped draft and fully approved before it was incorporated into AB 436. That legislation included an express declaration of legislative intent on this very issue raised by the Water Board [quoted in the response to Comments on section 16452 below] a declaration that the Attorney General's Bond Counsel helped draft, that was adopted by the Legislature and signed into law by the Governor.

Throughout the course of this controversy, no one has ever produced a legal analysis to substantiate the Water Board's view.⁷ It simply represented a way to interpret the language of the General Obligation Bond Law based on the assumption that labor compliance monitoring on public works projects was a newly devised responsibility imposed on awarding bodies in the twenty-first century rather than one of the California's oldest employment-related regulatory schemes, dating all the way back to the late nineteenth century. Because the Attorney General's bond counsel at first could not say for certain that the Water Board's view was wrong, this meant that her bond opinions would have to be qualified and hence that the SBX2-9 regulations, which made the CMU effective, became an impediment to selling public works bonds.

DIR's legal counsel then produced a white paper on the history on prevailing wage enforcement and labor compliance programs in the State of California, which persuaded the Attorney General's bond counsel that labor compliance enforcement was an inherent cost of public works construction that could be supported through bond proceeds, provided that funds from one bond were not diverted to pay for other projects or activities that had not been authorized or funded through that bond. Thereafter counsel on both sides engaged in

⁷ Two legal authorities have squarely addressed this question, and both rejected the Water Board view, finding instead that construction bond proceeds may be used to fund reasonably related oversight costs and that such expenditures are not prohibited by Government Code Section 16727. (*San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Unified School District* (2006) 139 Cal.App.4th 1356, 1401-2, and 87 Ops.Cal.Atty.Gen. 157, 162-3 (2004).)

a lengthy and arduous process of drafting clean-up legislation, using the most conservative language and concepts possible in order to avoid potential arguments that might lead to another qualified bond opinion.

Now that the Legislature and another Governor have again adopted legislation requiring this Department to implement a compliance monitoring and enforcement system on specified public works projects, our own efforts and limited resources must be directed toward fulfilling that obligation and not on trying to satisfy the concerns or improve the comfort level of others who do not interpret legal requirements the same way.

California Department of Public Health (CDPH): [Reiterated prior question asking who the awarding body is in the case of a privately-owned public water system.]

Director's Response: *See prior response to this question.*

Comments on section 16423:

The Solís Group: Expanding the requirements of section 16423(e) to every public works project under the authority of the Awarding Body will place an undue burden on Awarding Bodies, since it will require them to pay a fee for projects for which the Awarding Body will not be reimbursed by the State.

Director's Response: *Additional revisions were made to this regulation but not to the specific language referred to in the comment. As noted in the Initial Statement of Reasons, the change in wording of this subsection was to make it more consistent with the referenced statute (specifically Labor Code Section 1771.5(a)) and thus keep it from being construed more expansively than the statute. The commenter misconstrues this subsection as having something to do with the fees imposed by SBX2-9. Section 16423 was first adopted in 2004 to clarify requirements for awarding bodies that were required to have LCPs for certain bond-funded projects. The purpose of what originally was subsection (c) and now is subsection (e), was to clarify that the higher prevailing wage exemptions provided by Labor Code Section 1771.5(a) were only available to awarding bodies that use a labor compliance program for all of their own public works projects (as specified in the statute) and not to awarding bodies that used a labor compliance program only for bond-funded projects but not other projects. Since its adoption in 1989, Labor Code Section 1771.5(a) has always required an awarding body to use its labor compliance program for every project in order to take advantage of the higher exemptions; and this requirement has never been tied to any expectation of being reimbursed from the state for compliance monitoring. The City of Los Angeles and Los Angeles Unified School District are examples of awarding body labor compliance programs that are entitled to the higher exemptions because the programs enforce compliance on all of their public works projects, including projects that receive no state funding.*

CCMI: The language of section 16423(a) pertaining to the contracting out of responsibilities is extremely confusing in light of recent action essentially abolishing all Third Party Labor Compliance Programs.

Director's Response: It is not entirely accurate to say that third party labor compliance programs have been abolished, but the Department has stopped separately approving private third party programs and instead only determines whether an awarding body has an approved labor compliance program, an approach which is more consistent with Labor Code Section 1771.5(b) and other statutes that reference Section 1771.5. In light of this change and this comment, the language of the regulation was revised to eliminate references to contracting out and third party programs.

Comment on section 16423 following September revisions:

California Department of Public Health (CDPH): What is the definition of “under the authority of the Awarding Body?”

Director's Response: This language is drawn directly from Labor Code Section 1771.5(a). It has no additional statutory or regulatory definition. The reason for substituting this phrase for the prior language is explained in the Initial Statement of Reasons.

Comments on section 16450:

CCMI: This regulation does not offer a public agency the REAL choice of contracting with a third party; instead the choice is between having its own LCP or paying the DIR for monitoring payroll. If the intent of the regulation is to allow an agency to implement its own LCP, then the agency should be allowed to do so in the most efficient way possible, and it should not matter if that involves the use of outside consultants. [A second comment pertaining to “subsection (c)” actually refers to the language of the next section 16451 and accordingly is summarized and responded to under that section below.]

Director's Response: This comment refers to the use of an awarding body's own approved labor compliance program in lieu of paying for compliance monitoring and enforcement by the Department. The limitation on contracting out labor compliance program responsibilities to a third party is spelled out in statutory language as follows:

“In lieu of reimbursing the Department of Industrial Relations for its reasonable and directly related costs of performing, monitoring, and enforcement on public works projects, the [agency] may elect to continue operating an existing previously approved labor compliance program to monitor and enforce prevailing wage requirements on the project if it has either not contracted with a third party to conduct its labor compliance program and requests and receives approval from the department to continue its existing program or it enters into a collective bargaining agreement that binds all of the contractors performing work on the project . . .” (Education Code Section 17250.30(d)(3), as amended by AB 436.)⁸

Section 16455(c) of the regulations sets forth ways in which an awarding body may use

⁸ The same language is repeated in the nine other statutes amended by AB 436 that require use of the Compliance Monitoring Unit on design-build or other statutorily-authorized projects, and similar language expressing the same intent is found in the amended version of Labor Code Section 1771.3, which governs state bond-funded projects.

outside consultants without violating this restriction. However, the Department does not have any legal authority to do what the commenter suggests, which is to adopt a regulation that conflicts with or ignores the statutory restriction.

State Water Resources Control Board: The proposed language in subdivisions (a) and (b) of section 16450 is not clear as to whether it is the initial award to the recipient, the recipient's subsequent agreement(s) with contractors, or some other configuration that is the subject of the regulation. Nor is it clear as to when any such "public works contract" would become subject to the regulation. State Water Board staff therefore proposes returning to the prior versions of this section (using the phrase "any public works contract awarded") with the exception of the January 1, 2012, effective date.

Director's Response: *The prior language of this section was reorganized into a single subsection (a), and the specific language in question was changed to "contracts for public works projects" to conform to the revised language of AB 436. The language of the statute and regulation refers specifically to the awarding of a contract for public works, by an awarding body to a prime contractor, which is the usual event that triggers the obligation to pay prevailing wages under the Labor Code. The legislature clearly intended that this same benchmark be used to determine whether a project falls under the new CMU system or under preexisting requirements. The more difficult issue posed by the original language of SBX2-9 was the use of the word "contracts" without the qualifier "for public works projects". The traditional model in public works construction was to have a single contract between an awarding body and a prime contractor to build a public work, which made the contract for public works and the public works project synonymous for prevailing wage purposes. However, contracting methods have diversified considerably, and a public works project often may involve more than one "contract for public works," particularly when the awarding body decides to enter into direct contracts for each specialty trade rather than having a single general or prime contractor who then subcontracts the specialty work. Thus the prior language used in SBX2-9 could have been construed as requiring CMU applicability to be determined on a contract by contract basis, with the result that some projects might be required to switch over from one monitoring system to another according to when the contract for a particular aspect of the project or work activity was awarded. The Department has adopted the view that CMU applicability should be determined on a project-by-project basis, with one set of rules applying for the entirety of a project. The language of the statute and this regulation have now been revised to more closely reflect this view.*

California Department of Public Health (CDPH): The language of subsection (a) would appear to include projects funded by Proposition 84, which appears to conflict with the labor compliance program requirement of Proposition 84 codified at Public Resources Code Section 75075.

Director's Response: *AB 436 amended Labor Code Section 1771.3(c) to specify that CMU requirements "shall not apply to public works projects subject to Section 75075 of the Public Resources Code." This exception applies even if a project would be subject to CMU requirements as a result of receiving additional funding from another state bond. This exception is now clearly stated in subsection (b) of this regulation.*

Comments on section 16450 after September Revisions:

Fresno Unified School District: In subsection (a) the word “awarded” should be changed to “advertised.” There are requirements for the LCP program that are necessary as early as the advertisement. It is not fair to the agencies, when nothing has been approved or is effective yet. We cannot be required to foresee the future. It should be the start of a project after the effective date, which is the *advertisement* not the *award*.

Director’s Response: The statute uses the date the contract is awarded to determine whether the project is subject to SBX2-9. Consequently the suggested change cannot be accepted because it would conflict with the express requirements of the statute. The Director further notes that it should be possible at this time for awarding bodies to predict whether planned public works contracts will be awarded before or after the first of the year. Awarding bodies also may have some flexibility to schedule planned award dates for before or after the first of the year according to whether they want projects to be subject to existing labor compliance program requirements for the life of those projects (contracts awarded before January 1, 2012) or to monitoring and enforcement by the CMU (contracts awarded on or after January 1, 2012).

ABC: 1. Regarding the collective bargaining agreement exception added by AB 436, the DIR has a responsibility to confirm the existence of a fully-executed “collective bargaining agreement that binds all of the contractors performing work on the project” and confirm the existence of a legitimate mechanism for resolving disputes about the payment of wages by obtaining a signed copy of the agreement. Here is the regulation it should adopt:

The awarding body shall provide a copy of the collective bargaining agreement that binds all of the contractors performing work on the project. The agreement shall include the Notice to Be Bound that contractors must sign and shall include the specifications under which all contractor must sign the Notice to be Bound. The agreement shall include the specifications under which a mechanism is implemented to resolve disputes between contractors and trade workers or between contractors and the awarding body about the payment of wages. The agreement shall be signed by all applicable parties representing the trade workers, with each signature dated and notarized to ensure authenticity.

2. The DIR needs to provide reasonable definitions of “mechanism” and “disputes about the payment of wages.”

3. The DIR needs to explain via regulations how this “mechanism” and these “disputes” relate to the process of Civil Wage and Penalty Assessments authorized under the California Labor Code.

4. The DIR needs to ascertain whether or not the “collective bargaining agreement” actually binds all of the contractors performing work on the project. The operative word here is “all” and not “some” or “most.” Here is the regulation it should adopt:

To ensure that the collective bargaining agreement binds all of the contractors performing work on the project, the awarding body shall provide a list of all trade classifications listed within the bid specifications for that project and indicate if the

collective bargaining agreement binds those workers classified under that trade.

5. For the DIR to avoid granting fee waivers for contracts that do not include a bid specification for a “collective bargaining agreement that binds all of the contractors performing work on the project,” here is the regulation it should adopt:

The awarding body shall provide a list of all anticipated contracts to be awarded for the project and indicate if the collective bargaining agreement binds those workers for each particular contract. Only those contracts covered by the collective bargaining agreement are eligible for the fee waiver.

Director’s Response: *These five recommendations merit further consideration and study. However, for reasons previously noted in responses to the General Comments above, the Director is not in a position to delay or protract this rulemaking in order to draft and seek comment on additional regulations. The Director believes that the collective bargaining agreement exception can be applied on the basis of the statutory language without resort to further regulatory constructions or procedural requirements, unless particular problems arise that demonstrate the need for those aids. The Department will ask awarding bodies to submit copies of the agreements in question in order to verify the applicability of the exception – this instruction has been included in the new PWC-100 project notice form that is discussed in the response to comments under section 16451 below.*

California Department of Public Health (CDPH): We interpret section 16450(a) to mean the following: The requirements of proposed regulations would not apply to 1) contracts for public works that an Awarding Body entered into prior to January 1, 2012, and 2) the Awarding Body would be able to continue using their own LCP or the third party contractor LCP for that public work contract(s) awarded prior to January 1, 2012. [The comment then asks a series of questions related to its interpretive statement.]

Director’s Response: *CDPH’s interpretation is correct. The subsequent questions appear to be based on the assumption that the interpretation may be incorrect. No further response is required in the context of this Statement. However, CDPH is welcome to contact the Department’s staff counsel for further guidance on the requirements of SBX2-9, as amended by AB 436, and these regulations.*

CCMI: Subsection (c) allows an LCP exemption if the Awarding Body has entered into a “collective bargaining agreement that (1) binds all contractors and subcontractor performing work on the project and....” I suspect this exemption was meant to apply to Awarding Bodies who enter into a “Project Labor Agreement” and not a “collective bargaining agreement”. Legally, these agreements are different in nature and I know of no Public Agency which has entered into a collective bargaining agreement binding contractors and subcontractors on an independently bid construction project.

Director’s Response: *The regulatory language is drawn directly from the statute, and has been used for several years to state an exception to the labor compliance program requirement found in the design-build statutes that were amended by SBX2-9 and AB 436. It is commonly understood as referring to a project labor agreement, but will have to be interpreted in accordance with the actual language of the statute and regulations.*

Comments on section 16451:

CCMI: The subsection (c) requirements for public agencies to put information about the Compliance Monitoring Unit in the Call for Bids and contractors to submit certified payroll records to the Department electronically present practical problems where the agency does not receive state bond funding (making it subject to CMU requirements) until mid-project. One solution is to mandate CMU compliance on any project for which the agency has applied for bond funding, although we believe that is beyond the DIR's legal authority. Another alternative is to allow hard copy payrolls if state bond funding was received more than six months or 50% through the construction schedule (whichever is less).

Director's Response: The Director agrees that the statute does not permit expanding the requirements of SBX2-9 (or spending CMU fees) for projects that are not covered by the statute, including projects for which an agency may have applied but has not yet received state bond funds. The requirements in subsection (c) are necessarily limited to projects that are covered by one of the SBX2-9 statutes, as delineated in section 16450 of the regulations, and this regulation (section 16451(c)) cannot and will not be construed as requiring CMU language in a Call for Bids for a project that is not yet subject to the statute. At the same time, since Calls for Bids and public works contracts tend to include a lot of standardized language, the Department recommends including language indicating that the project may become subject to CMU requirements should the agency apply for and receive state bond funding.

With regard to certified payroll records, neither the statute nor regulations expressly require electronic submission. The Department has developed an electronic payroll reporting system and intends that it be used by all contractors on projects monitored by the CMU and that there be no cost to the contractors. However, as with the Call for Bids, the Department cannot enforce such an expectation retroactively, and the possible need to transition from paper reporting to electronic reporting by some contractors on some projects that are picked up midstream, is one of the practical problems that the Department will try to address without adding to the burdens or costs of local agencies or contractors.

California Department of Public Health (CDPH): It is not clear what is meant in subsection (a)(1) by "released the funds". CDPH bond programs disburse funds to funding recipients on a reimbursement basis, and it is unclear whether the term "released" refers to when the first such claim is paid or when the final claim is paid. CDPH awards funding at the time the formal funding agreement is executed, and thus the date the funds are "awarded" always precedes the date the funds are "released". Therefore, it is important the proposed regulation clearly identify the meaning of "released". In addition, for a project that is funded by multiple sources, including state, federal, or private funds, are all of the funding sources the "funding agency". When does an Awarding Body give notice of the release of funds when there are multiple sources of funds? Is it when the final disbursement of funds is made by all funding agencies? Is it when the first claim is paid by each funding source or is notice given each time a funding agency disburses funds? Who is responsible for tracking that the Awarding Body notified DIR of the release of funds?

Director's Response: Although the Director has not proposed to revise this particular

phrase, which was part of the regulatory language adopted in 2010, the meaning can be clarified through this response. The phrase must be understood in relation to the title of this regulation, and to the preamble and the entirety of subsection (a), which requires awarding bodies (not funding agencies) to provide the Department with notice of any public works project that becomes subject to the requirements of SBX2-9. The preamble states that the awarding body shall provide notice, referring to a single, one-time notice, and subparts (1) and (2) state when the notice must be provided, according to whether the project becomes subject to SBX2-9 requirements due to the receipt of state bond funds [subpart (a)] or due to the applicability of one of the other non-bond statutes that imposes these requirements [subpart (b)]. The regulation only requires a single project notice, and the intent of the phrase “awarded or released, . . . whichever is later” was to have the awarding body provide notice when it became definite that the project was subject to these requirements through the receipt of state bond funds, enabling the Department in turn to commence monitoring and enforcement on a timely basis. In any event, the notice required by subpart (a) is a project notice rather than a funding release or disbursement notice; this subpart does not require multiple notices or notices tied to funds that are unrelated to the requirements of SBX2-9.

In practice, the Department will also be taking other steps to ascertain which projects will become subject to monitoring and enforcement under SBX2-9, and the PWC-100 form that has been developed for purposes of providing the required notice under section 16451(a) can also be used to comply with the project notice requirement in Labor Code Section 1773.3 (public works contracts subject to apprenticeship requirements). This means that the Department will already have notice of many of these projects well in advance of this particular regulatory deadline. The regulation does not have a mechanism for tracking whether an awarding body failed to provide a project notice as required. However, bond-funding agencies, including CDPH, typically have required proof or certification of compliance with any statutory obligation to initiate a labor compliance program before providing bond funds, and the Department anticipates that the new statutory obligation to use the Department (or a prescribed alternative) for labor compliance on state bond-funded projects will be enforced in the same manner.

Comments on section 16451 after September revisions:

Fresno Unified School District: 1. With regard to the notification requirements in subsection (a)(1), that majority of our projects are finished prior to applying for or receiving SAB unfunded or funded approvals. You changed the language from “funded” to “paid for”. We are financing (paying for) the construction up front and if we receive state bond funds, they are in the form of reimbursement. So, could you clarify, are we even subject to the requirements? When are we to provide the notification? 2. [Identified as a comment on section 16454 but clearly pertains to this section] Re: transmitting Notices on-line using the format and instructions on the website and the submission of one notice to meet both this notification and apprenticeship, it seems that if the notice is required by 1773.3, you could just say that notice could serve a dual purpose. I have looked on-line for the format and instructions, but it doesn’t seem to have been created yet. Is it available?

Director’s response: *These comments highlight one of the practical problems of the legis-*

lation that cannot be fixed by regulation. An awarding body's obligation to pay for compliance monitoring by the Department on a given project, and the Department's corresponding responsibility to actively monitor that project, are only triggered when the conditions in one of the SBX2-9 statutes are met. In the situation described by the commenter, this would occur when the project receives funding through a state bond, and as the commenter further notes, this may not happen until after the project has already been built with local funds. In such circumstances, the Department will still endeavor to monitor compliance through a post-project audit or review (as the Labor Commissioner often does now when a public works complaint is filed after work has been completed).

For state bond-funded projects, the regulation does not require an awarding body to submit a project notice until the condition of receiving state bond funds for the project is met. However, as explained in the response to the California Department of Public Health immediately above, the awarding body should be sending a notice at the time of the public works contract is awarded to comply with the requirements of Labor Code Section 1773.3, if the project is for \$30,000 or more and will use apprenticeable crafts.⁹ As this commenter discerns, the intent is to have a single notice (PWC-100 form) that serves a dual purpose, although the requirements must be stated separately since not every project will be subject to the notice requirements in both Labor Code Section 1773.3 and this regulation. The new PWC-100 (replacing the old DAS-13 form) is in the final stages of development and should be available for downloading from the Department's website before the end of October. The Department will also make it possible to complete and transmit the notice electronically and expects to have that feature available by January 1, 2012.

California Department of Public Health (CDPH): 1. Reiterated questions about the meaning of "released the funds" and asks other questions outside the scope of the regulatory language. 2. What is the process and criteria used to determine that a single notice will suffice? How will the process and criteria be disclosed to the public? 3. What is the definition of "internal costs" as used in subsection (3)(G) and what type of contract is considered "not for public works"?

Director's Response: *See prior response to the first question. The term "released the funds" would refer to an actual payment, which appears to be how the CDPH understands it; and as noted in the prior response to this question, it is an attempt to prescribe and describe a deadline for submitting a one-time only notification of the existence of a subject project in terms that bond recipients would understand, although not all bond payment and reimbursement processes are the same. As stated in the preamble of subpart (a), the notification requirements in this regulation only apply to projects "subject to the requirements of this subchapter," meaning projects that require compliance monitoring and enforcement by the Department (or a prescribed alternative) under one of the SBX2-9 statutes. This regulation does not require and cannot reasonably be read as requiring multiple fund release notices or any notification having to do with various kinds of funds, as opposed to notice of a project that is subject to the requirements of the subchapter because it is funded "in whole or in part" from a bond issued by the state (the fundamental applicability crite-*

⁹ Labor Code Section 1773.3 requires notices for projects that fall within the jurisdiction of Labor Code Section 1777.5, and these are the two relevant criteria that bring a project within that jurisdiction.

rion stated in Labor Code Section 1771.3). Although not specifically referenced in the comment, subpart (a)(1)(F) does require an estimate of how much “state-issued public works bond funding” will be provided to the project, this information being necessary to calculate the statutory maximum that can be charged by the Department for compliance monitoring and enforcement under Labor Code Section 1771.3(a)(3), irrespective of the actual costs of such monitoring and enforcement.

The Director is not sure she understands the second question. Labor Code Section 1773.3 requires awarding bodies to notify the Division of Apprenticeship Standards of the award of a public works contract that meets specified criteria, and the Department has provided a form known as a DAS-13 for this purpose. This regulation requires notice of projects subject to the requirements of SBX2-9, and during the original rulemaking, a member of the public pointed out that the regulation asked for much of the same information as the DAS-13 and thus that the DAS-13 form could be adapted for use in complying with this regulation. The Department thought that was an excellent suggestion, and we have created a new PWC-100 that can be used to comply with either notice requirement or both and which only needs to be sent once to comply with either requirement or both, thus saving time, money, and effort for everyone involved. Because the regulation by its terms only requires a single notice for any project, there is no need for a process to determine when or if a single notice might suffice.

With regard to the last two questions, the rulemaking process requires an agency to respond to suggestions for modifying regulatory language, but it does not require an agency to answer a lengthy series of questions about legal requirements in a document that must be reproduced and mailed to everyone who participated in the rulemaking. As explained in the original rulemaking and the Initial Statement of Reasons for this rulemaking, the term “total project costs” is not qualified or defined in the statute and only provides a benchmark for calculating the maximum allowable fee rather than delineating or delimiting what work will be subject to compliance monitoring and enforcement. Nevertheless, the former Director adopted a definition that was more restrictive than the statutory term, and the current Director has further restricted the definition to allay concerns that the maximum recoverable fee would be based on aspects of the project that were not considered public works. Unfortunately, tying the definition to what is legally “public works” necessarily incorporates a whole body of definitional and interpretive law that cannot be expressed in a single regulation, let alone a sentence or short paragraph. Ultimately, the definition depends on what constitutes “public works” for the purpose of requiring the payment of prevailing wages, which is continually being revised through legislation and interpreted by the courts.

Comments on section 16452:

The Solís Group: The Department’s belief that imposing the fee requirement on the “total project cost” would reduce costs to the Awarding Body is a significant departure from the previous requirement in which the costs were imposed on the bond amount released to the awarding body. This is in addition to the administrative cost for calculating and tracking the total project cost.

CCMI: This fee provision is not substantially different from the one that was suspended.

Our analysis based on our own costs, the Department's projected costs, and projected maximum fees, indicates that this program will be seriously underfunded from its first day of operation.¹⁰ Also troubling is the position taken by the Department in the prior rulemaking that it will not commit to the same thorough review required of LCPs.

State Water Resources Control Board: State Water Board staff objects to the language of subdivision (b) on several grounds. First, Government Code Section 16727 does not authorize the use of bond proceeds to fund labor compliance activities, while the regulation appears to envision using bond proceeds for this purpose. Second, the regulation does not explain or detail the contents of Department of Finance approved fee standards. Third, clarification is requested of the language which specifies that the standards "may provide for direct billing and payment of fees" by agencies that administer bond monies, which leaves agency responsibility unclear.

California Department of Public Health (CDPH): The language of subsection (b) lacks clarity and authority (followed by a series of questions about the meaning of various terms). [The comment also asks a series of questions about subsection (c).]

Director's Response: *The language of this regulation was substantially revised in light of AB 436. However, these comments deserve a further response to clarify how the fee requirements have been changed and the impacts of those changes.*

The statute sets two different fee maximums – one for projects that receive state bond funds and the other for projects that do not receive state bond funds but fall within one of the design-build or other statutes that require use of the Compliance Monitoring Unit. The maximum fee for bond-funded projects is one-quarter of one percent of the bond proceeds, and the maximum fee for other projects is one-quarter of one percent of "total project costs". Under the prior statutory and regulatory language, the Department intended to collect a flat fee in accordance with whichever formula applied, with the higher fee payable if both formulas applied. However, under AB 436 and these regulatory revisions, the Department will only be reimbursed for its reasonable and directly related costs of compliance monitoring and enforcement on the project in question, with the statutory language setting the maximum amount of costs that can be reimbursed on any one of these projects. Moreover, for state bond-funded projects, the maximum fee will be one-quarter of one percent of the state bond proceeds, even if the project also falls within one of the statutes subject to the "total project costs" formula. These revisions also adopt a more limited definition of "total project costs" than used in the original regulatory language. The net effect of the revisions is to reduce the potential fees that will be payable to the Department for compliance monitoring, while, as the commenter suggests, increasing the administrative cost for calculating and tracking fees.

The Director does not dispute CCMI's contention that the program is seriously underfunded in relation to what has been paid to support the cost of labor compliance programs required for state bond-funded school construction projects under Labor Code Section 1771.7. This reflects a legislative choice that also responds to CCMI's other observation about the Department's unwillingness to commit to the same prescribed activities required

¹⁰ The comment includes an extended factual analysis of projected fees and costs.

of labor compliance programs, although there are additional reasons discussed in the prior rulemaking why Department need not be subject to the same performance standards as labor compliance programs.

The Water Board's contention that the Government Code prohibits using general obligation bond proceeds for labor compliance activities has never been substantiated through any formal legal analysis. Following a thorough examination by this Department that contention was found by the Attorney General's bond counsel to be in error. The Attorney General's bond counsel then assisted in drafting and approved the following statement found in section 1(f) of AB 436:

"The Legislature further finds and declares that monitoring and enforcing compliance with the applicable prevailing wage requirements on a public works project paid for out of public funds that are derived from state-issued bonds, whether by use of an approved labor compliance program or other method, is and historically has been a necessary and prudent oversight activity, and under existing law, the authority to use bond proceeds for construction of a public works project inherently includes authority to pay reasonable costs of such oversight activities that are directly related to such construction from state bond proceeds allocated to such construction."

Having been adopted by the Legislature and signed into law by the Governor, this is the legal construction that is binding on this Department, the State Water Resources Control Board, and all other state agencies. (California Constitution, Article III, Section 3.5 [state agency has no authority to declare a statute unconstitutional or unenforceable, or to refuse to enforce a statute on the grounds that it is unconstitutional unless an appellate court has determined that the statute is unconstitutional].)

The Water Board's other concern over the uncertainty of what may be required under Department of Finance-approved standards is one of the unfortunate consequences of the controversy raised with respect to the original regulatory language. The statute never required the CMU fees to be adopted by regulation, and the change from a flat rate fee structure (based on the statutory language and how labor compliance has been funded by the State Allocation Board for several years under Labor Code Section 1771.7) to a cost reimbursement method under AB 436, assures that the fees and related agency requirements cannot be spelled out by regulation. The revised language of subsection (b) now serves the purpose only of informing the regulated public to look elsewhere to determine what fees the Department may charge for compliance monitoring and enforcement.

Since CDPH's comments were submitted three weeks after the close of the public comment period, and its questions focused mostly on language that was deleted or revised, it would not be helpful to try to address those questions in this Final Statement of Reasons. For a general description of how fee maximums and recovery formulas were changed under AB 436, CDPH is directed to the earlier part of this response above.

Comments on section 16452 after September revisions:

ABC: DIR needs to clarify that while the payment of fees shall be based initially on "estimated total project costs," the final assessment of fees shall be based on the true final cost

of the project. In addition, the regulations do not provide for a procedure to refund fees to the awarding body if a project is cancelled or suspended while in progress.

Director's Response: These comments refer to the original regulatory language that was superseded by AB 436 and these regulatory revisions. The Department will not be assessing or collecting fees based on estimated costs; rather the Department will be reimbursed for its reasonable and directly related costs for monitoring and enforcement on a project, and the "total project costs" figure will serve only to determine the maximum fee recoverable on a project that does not receive state bond funding. There may be contingencies that would alter this total project costs figure and the corresponding maximum fee recoverable by the Department, but it is not clear that regulatory standards will be needed to address those contingencies, particularly since a \$50,000 variation in total project costs will only cause a \$125 variation in the maximum fees recoverable by the Department.

State Water Resources Control Board: The language of AB 436's Labor Code Section 1771.3(a)(3) expects DIR to "adopt regulations implementing this section." Yet, neither the Regulations nor the accompanying Statement of Reasons explains or details the amount of or procedure involved in establishing the "rates" with the DOF Director's approval. As a result, the DOF rate establishment process has been pushed further underground than in the previous version of these regulations.

Director's Response: This comment misconstrues the requirements of Labor Code Section 1771.3(a)(3) by excerpting five words and quoting them out of context. The subsection quoted in full states:

The Director of Industrial Relations shall adopt regulations implementing this section, specifying the activities, including, but not limited to, monthly review, and audit if appropriate, of payroll records, which the department will undertake to monitor and enforce compliance with applicable prevailing wage requirements on public works projects paid for in whole or part out of public funds, within the meaning of subdivision (b) of Section 1720, that are derived from bonds issued by the state. The department, with the approval of the Director of Finance, shall determine the rate or rates, which the department may from time to time amend, that the department will charge to recover the reasonable and directly related costs of performing the monitoring and enforcement services for public works projects; provided, however, that the amount charged by the department shall not exceed one-fourth of 1 percent of the state bond proceeds used for the public works projects.

The first sentence sets forth the Director's duty to adopt regulations governing performance standards, using language that has been slightly revised and moved from its original location in Section 1771.55(b)(2). The second sentence requires (as did its predecessor in former subsection (a)(2)) that the Director, with the approval of the Director of Finance, determine the rate or rates and from time to time amend those rates to recover reasonable and directly related costs. Neither this express language nor the requirements of the Administrative Procedure Act require these rates to be determined through a regula-

tory process,¹¹ and the process of determining rates to reflect actual costs, involving different employees, with different salaries and costs, in different locations, and then amending those rates “from time to time” defies resort to the regulatory process.

California Department of Public Health (CDPH): 1. The language of subsection (b) lacks clarity and authority, leading to another series of questions, including what is meant “from any bond?” Will multiple rates be charged? Does an Awarding Body have an opportunity to challenge a rate charged? Could the amount of the fee change during the project? 2. The language of subsection (c) lacks clarity and authority and leads to another series of questions relative to the ability to impose labor compliance on other funds, the possibility of paying double on Proposition 84 projects, what maximum fee would be charged, when it would be charged, and when it would be payable.

Director’s Response: *The commenter appears to be unfamiliar with the revisions made by AB 436, as these questions appear to be based on the prior regulations and reflect no awareness of how the fee requirements were changed by AB 436. The language of subpart (b) is drawn directly from the statute, specifically Labor Code Section 1771.3(a)(3) as amended by AB 436, and, as noted in the Supplemental Statement of Reasons issued with the revisions, the intent and purpose was to inform the public that the fee requirements for state bond-funded projects will be determined in accordance with statutory specifications and limitations but are not being set forth in these regulations. Labor Code Section 1771.3(a)(1) also defines the scope of these requirements as extending to “any public works project paid for in whole or part out of public funds . . . derived from bonds issued by the state.” There is no qualification or limitation in the statute on types of “bonds issued by the state,” and the Director has no authority to change the scope of this statutory language by regulation. CDPH’s additional questions about how the rate structure will work or when the fees will be paid are necessarily outside the scope of the regulatory language since the regulatory language does not specify what the rate structure is.*

Neither the statute nor the regulations impose or assess fees on funds. The statute and regulations authorize the Department to charge awarding bodies for the reasonable and directly related costs of actual compliance monitoring and enforcement on a subject project. The statute and regulations also prescribe the maximum that can be charged, regardless of the actual costs, based on the amount of state-bond proceeds if it is a bond-funded project or “total project costs,” a term that is further limited by regulatory definition, if it is not a state bond-funded project. The statute (Labor Code Section 1771.3(c), as amended by AB 436) and the amended regulatory section 16450(b) completely exempt any project subject to the requirements of Public Resources Code Section 75075 – a specific reference to the labor compliance program requirement of Proposition 84 – from the requirements of SBX2-9 and these regulations, even if those requirements otherwise would apply due to the receipt of funding from another state bond. Therefore there is no possibility of paying double on Proposition 84 projects because those projects would never be subject to a charge under this statute and these regulations.

¹¹ Government Code Section 11340.9(g) provides that the Government Code chapter on Administrative Regulations and Rulemaking *does not* apply to “a regulation that establishes or fixes rates, prices, or tariffs.”

The rulemaking process requires an agency to summarize public comments and respond to suggestions for modifying regulatory language. However, it does not require an agency to answer a lengthy series of questions outside the scope of that language in a document that must be reproduced and mailed to everyone who participated in the rulemaking. CDPH is welcome to contact the Department's staff counsel to ask questions and obtain further guidance on the requirements of SBX2-9, as amended by AB 436, and these regulations.

Comments on section 16454:

None.

Comments on section 16454 after September revisions:

Fresno Unified School District: [See comments on section 16451 after September revisions above. Comments listed as pertaining to 16454(a)(4) and (b) clearly pertain to 16451(a)(4) and (b).]

Director's Response: See response to comments on section 16451 after September revisions above.

Comments on section 16455:

Bret Harte Union High School District: As a school district we have actively embraced and complied with all DIR regulations and requirements since 2002. During this time there have been many revisions and changes to regulations that have been both confusing and complex, which in turn require more and more staff time to digest, re-interpret, and revise policies and program provisions. As regulations continue to be amended, modified, repealed, suspended, and modified again, we are more dependent on specialists in the field of labor compliance to keep pace with these requirements and keep construction on course. However, these regulations will limit access to the individuals who most understand them – Third Party Labor Compliance Providers. Based upon the foregoing we request that Section 16455(c)(2) be revised to permit Districts the right to determine the best organizational method and approach for staffing a DIR-approved LCP and allow the flexibility to maintain and utilize cross trained staff whose primary function varies based upon organizational necessity. We ask that DIR place its focus on supporting the successful implementation of LCPs and allow Districts to maintain local control to determine the best method and approach to staffing and accomplishing program objectives. The true emphasis of DIR should be placed on the successful implementation of the individual LCP and whether or not workers are properly paid. Swifter response to request for clarification and technical support in deciphering precedent setting decisions should be the focus as well.

Cerritos College: Same comments as Bret Harte Union High School District.

Mt. San Antonio College: Same comments as Bret Harte Union High School District.

CCMI: This regulation allows a public entity with its own labor compliance program to be

exempt from paying the DIR/CMU fee, but disallows the exemption if the public entity uses the services of a third party consultant (whether a formal labor compliance program or not). This prevents the agency from determining the most efficient and cost effective way to manage a labor compliance program, and will have a severe impact on small businesses who typically provide consulting service to public entities, including engineering consultants, construction management firms, and consultants like CCMI who are brought in for overflow work. Most troubling is that public agencies receiving both state and federal funds for their projects may use an outside Labor Compliance consultant to ensure compliance with many of the same kinds of requirements under federal law and thus will be put in a situation of having to pay an outside consultant as well as the DIR/CMU to review the same payroll.

CS & Associates: Section 16455(c)(2) is overreaching in terms of DIR's authority and has the effect of dictating the circumstances under which a local agency may utilize outside services. It further denies local agencies the right to determine the best organizational method and approach for staffing an internal LCP and limits its flexibility to use staff in a manner that best serves the needs of the organization. We ask that DIR focus on the more productive issue of supporting the successful implementation of LCPs and allow local agencies to maintain control of staffing and consulting decisions.

Redondo Beach Unified School District: Same comments as Bret Harte Union High School District.

Inglewood Unified School District [late]: Same comments as Bret Harte Union High School District.

Director's Response: See the response to CCMI's comments on section 16450 above. This regulation does not in any way limit or deny awarding bodies the right to determine how to organize their labor compliance programs or make use of outside consultants. SBX2-9 created a financial disincentive against continued use of third party labor compliance programs by making awarding bodies that contract out labor compliance program responsibilities ineligible for waiver of CMU fees. However, that is a statutory limitation that the Director cannot alter by regulation. Awarding bodies nevertheless may continue to use outside consultants for labor compliance monitoring and pay the Department the minimal fees that will be due for compliance monitoring and enforcement on projects subject to SBX2-9 if they so choose. Subsection (c) of this regulation also sets forth ways in which an awarding body may use outside consultants without violating the statutory restriction in SBX2-9.

Comments on section 16455 following September revisions:

Fresno Unified School District: Is there going to be more direction on the revised fee waiver provisions? What is required? Are we to send a letter requesting approval to continue? Do we need to redo a Board Resolution? Are you looking for a certain format? If Governing Board action is going to be required, we would need to know immediately, as we are about to submit items for that December agenda.

Director's Response: A Fee Waiver Notice and Questionnaire will be sent to awarding bodies with approved labor compliance programs by the end of October. The questionnaire will serve as an application for approval to continue operating a previously approved labor compliance programs for awarding bodies that wish to exercise that option. Awarding bodies will also be asked to submit a copy of their most recent board resolution pertaining to the labor compliance program.

State Water Resources Control Board: AB 436 eliminates existing law requiring recipients of Proposition 50 funds to obtain third party certification of their labor compliance programs, while subjecting some of these recipients to the proposed DIR fees. We recommend that the proposed section 16455 exempt funding recipients that have already complied with the Labor Code's requirements to obtain third-party certification from paying the proposed DIR fee. Otherwise some recipients will pay twice for labor compliance.

Director's Response: This comment misstates and confuses statutory requirements. AB 436 repeals Labor Code Section 1771.8, which required awarding bodies to adopt and enforce or contract with a third party to adopt and enforce a labor compliance program on a project that receives Proposition 50 funds. This Department approves labor compliance programs; but it does not enforce the requirement to have a labor compliance program and does not provide "third party certifications" which is not terminology this Department uses or recognizes.

The repeal of Labor Code Section 1771.8 will terminate the obligation to use a labor compliance program on any Proposition 50-funded project that was or will be commenced prior to the effective date of the SBX2-9 regulations. Any awarding body that chooses to continue paying for labor compliance program services on such a project after the repeal will be doing so voluntarily or for purposes of complying with a grant condition, but not due to a requirement or expectation of this Department.

The new CMU fees under SBX2-9, as amended by AB 436, apply only to projects commenced on or after January 1, 2012. As has been emphasized elsewhere in this Statement, only one set of rules applies to a project, depending on when the contract for the project was awarded. For Proposition 50-funded projects, the repeal of Labor Code Section 1771.8 means that there will be no labor compliance program requirement for projects commenced prior to January 1, 2012, but there will be a CMU requirement for projects commenced on or after that date, unless one of the exceptions applies. Hence, there is no obligation under the statute or these regulations to "pay twice for labor compliance."

As has also been emphasized in response to numerous other comments, the Director has no legal authority to create any exemption from CMU fees for awarding bodies that contract labor compliance program responsibilities to third parties. The statute expressly precludes such an exception or exemption.

CCMI: CCMI believes it is appropriate to add a clarification to the exemption when an Agency may use a consultant and this will NOT be considered as precluding the fee waiver. We believe the following clarification should be added:

(4) For the purposes of assisting the Awarding Body with Federal prevailing wage and compliance requirements.

While federal Davis-Bacon and ARRA requirements are similar to California prevailing wage requirements, they are distinctly different. ARRA funding requires very specific compliance matters which may overlap with the Agency's normal California LCP program. Agencies are concerned and want to clarify that if they implement their own LCP, but then hire a Third Party to Assist with Davis-Bacon and/or ARRA projects, that the use of the consultant for that federally funded work will not be interpreted or misconstrued by the DIR/CMU as disqualifying the Agency from the fee waiver.

Director's Response: The suggestion was not accepted since it would require additional time for public review and comment, and the actual need for and ramifications of such an exception are unknown. The assumption that necessarily underlies this proposal is that awarding bodies would have the staffing and expertise needed to operate an in-house program to monitor and enforce California's higher and more extensive prevailing wage requirements on their projects, but would depend upon an outside consultant to monitor and enforce more limited and sometimes overlapping Davis-Bacon requirements.

Comments on Alternatives and Options:

CCMI: Allow any public entity who has its own LCP to conduct that LCP however it wishes with or without the hiring of consultants and allowing those public entities with an approved LCP an exemption from the DIR/CMU fee, with continuing requirement to file Annual Reports and periodic monitoring of enforcement work being done. If an Agency chooses not to obtain approval of its own LCP, then the CMU can be the alternative. However, to be truly effective the CMU must monitor both prevailing wage AND apprenticeship compliance issues. The DIR has authority over both Divisions and needs to strive for full compliance with prevailing wage project requirements.

There are so many more practical ways to enforce Labor Compliance. CCMI realizes that some of these solutions rest in the hands of the legislators but submit these suggestions for the DIR's consideration as well:

1. Enforcement of 1776 penalties should be against the individual contractor or subcontractor who failed to submit the required documentation. DIR's current interpretation of only enforcing the penalties as against the prime contractor leave many LCPs without an enforcement mechanism against the true offender, a noncompliant subcontractor.
2. Change the provisions of Labor Code Section 1777.7 to also exempt project which can be completed within 20 work days or any subcontractor who can complete its work within 20 work days.
3. Enact regulations which clearly define that the failure to properly supervise an apprentice or employing more apprentices than allowed by the standards is not only a violation of the apprenticeship standards, but is also a wage violations that requires apprentice to be paid full journeyman scale. The employment of apprentices who are unsupervised or employed in a higher ration than allowed breaches the apprenticeship standards also provides an unfair wage advantage on the contractor. The U.S. DOL under the provisions of the Davis-Bacon and Related Act requires all apprentices to be employed in proper ratios and supervised by appropriate journeyman; otherwise those

apprentices are paid at the higher journeyman rate. Such action is considered both a wage violation and a violation of the Apprenticeship Standards.

4. Provide clear regulations on the issue of trucking to and from the project. Current regulations are incomplete.

5. Some options must be developed to address those public agencies who receive both State and federal funding. The Public Agency should not have to hire labor compliance assistance to meet the federal prevailing wage requirements and still have to pay the CMU for monitoring the California prevailing wage requirements. The Davis-Bacon and Related Acts requires the contractor to pay the higher of the two wages (state or federal) and comply with the more restrictive regulations (holidays, training, travel and subsistence). Thus the private consultant MUST review the State prevailing wage requirements as well as the federal requirements. The Agency is paying the CMU a second time for work it is already paying for relating to federal compliance. CCMI proposes that where a public agency has both State and Federal funding, they be exempt from the DIR/CMU fees when an appropriate federal LCP audit is being conducted by the agency or appropriate consultant.

6. Instead of spending resources on hiring scores of CMU employees, hire another 2-3 hearing officers so that when matters go to hearing/appeal, the parties do not have to wait more than 90 days for a ruling. CCMI recently waited 17 months after submitting briefs to receive a ruling. While there were many complex issues and over 2600 violations involved in that matter, the real delay is attributable to the fact that there are only 2 hearing officers in Northern California.

7. Redeploy resources so that complaints are investigated while a project is still ongoing. In one instance an agency reported a series of prevailing wage violations to the DIR for investigation. The DIR did not begin its investigation until a year later because the project was still ongoing and the Deputy Labor Commission had up until 180 days after the project was completed to file a Notice to Withhold. However, an agency typically releases funds to the Contractor 30-60 days after the project is completed. This delay not only impacted the DIR's ability to hold the offending contractor's money, but also resulted in employees being underpaid wages for over a year and having to wait more than 18 months to receive restitution.

CCMI realizes that items 6 and 7 are the result, in part, to restricted resources and budget cuts. But rather than implementing a CMU program already designed to create a deficit, CCMI is suggesting there is a better way to deploy the limited funding and resources allocated to the DIR.

8. The Legislature should reconsider the use of DIR Approved Third Party Labor Compliance Program. CCMI agrees that the wholesale approval of hundreds of LCP who did not have the required expertise in this area resulted in poor performance of the LCP program. However, since the new, stricter regulations were put into place January 2009 and requirements relating to annual reports and other compliance matters are strictly enforced by the DIR, those Third Party LCP who have current approval are those entities which "know their stuff" and provide real value to public agencies. In 2010-2011 CCMI assisted one public agency in an award of over \$100,000 in wages due to workers and over \$100,000 in penalties. There is real value in the expertise we provide to

public agencies.

Director's Response: The commenter's Alternatives and Options include several helpful suggestions for how to clarify and improve the enforcement of California's prevailing wage requirements. However, they are outside the scope of this rulemaking, and the items that require statutory changes (including 1, 2, and 8) are completely outside the scope of the Director's rulemaking authority. Because the Legislature has mandated fee-based compliance monitoring by the Department on specified projects, the task of this rulemaking is necessarily confined to implementing that mandate, including by bringing the regulatory language into alignment with the statutory revisions adopted through AB 436. Consequently, while the commenter has offered different ways to accomplish the task of labor compliance enforcement, they are not alternatives for implementing the statutory requirements of SBX2-9, as amended by AB 436.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective as and less burdensome to affected private persons than these regulations.